

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

RONALD DEAN MCCOY,)	
)	
Plaintiff,)	8:06CV566
)	
v.)	
)	
UNITED STATES OF AMERICA,)	MEMORANDUM AND ORDER
)	
Defendant.)	
)	

Plaintiff has filed a motion for leave to file an amended complaint. Rather than filing a brief opposing the motion for leave to amend, defendant has filed a motion to strike or alternatively to suspend progression on plaintiff's motion to amend the complaint. Defendant argues that plaintiff's motion to amend does not conform with this court's local rules, and that defendant's pending motion to dismiss or for summary judgment, filed before plaintiff's motion for leave to amend the complaint, should be heard and decided on the merits. Plaintiff has not responded to the motion to strike or suspend.

NECivR 15.1 provides:

15.1 Motion to Amend Pleading.

(a) Form and Content. A party who moves for leave to amend a pleading (including a request to add parties) shall file as an attachment to the motion an unsigned copy of the proposed amended pleading. Except as provided in these rules or by leave of court, the proposed amended pleading must be a complete pleading which, if allowed to be filed, supersedes the pleading amended in all respects; no portion of the prior pleading may be incorporated into the proposed amended pleading by reference. The motion for leave to amend shall set forth specifically the amendments proposed to be made to the original pleading, state whether the motion is unopposed,

and identify the amendments in the proposed amended pleading.

Although the plaintiff's motion is properly supported by a brief, it does not include a proposed amended complaint. Thus, it does not conform to the local rule. Since the court cannot properly review a proposed amended complaint that has not been placed before it, the motion for leave to file one must be denied.

It is the court's usual practice to grant a properly filed motion for leave to file an amended complaint even while a motion to dismiss the original complaint is pending. While such action moots the pending motion to dismiss, it does permit the filing of a new motion to dismiss directed at the amended complaint, and allows the court to evaluate the case based on the merits of all the plaintiff's pleaded claims. See Pure Country, Inc. v. Sigma Chi Fraternity, 312 F.3d 952, 956 (8th Cir. 2002) (holding the granting of a motion to dismiss and simultaneous denial of a pending motion for leave to amend complaint as moot was "plainly erroneous").

IT THEREFORE HEREBY IS ORDERED:

1. The motion for leave to file amended complaint, filing 34, is denied.

2. The motion to strike or suspend, filing 36, is denied as moot.

DATED this 6th day of June, 2007.

BY THE COURT:

s/ *David L. Piester*

David L. Piester
United States Magistrate Judge